

Office of Personnel Management

§ 536.102

(2) To derive a daily rate, multiply the hourly rate by the number of daily hours of service required by the administrative appeals judge's basic daily tour of duty.

(3) To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, as the case may be.

§ 534.605 Conversion.

On the first day of the first pay period beginning on or after December 11, 2001, agencies must convert the rate of basic pay of an administrative appeals judge to the lowest rate of basic pay provided by § 534.603(a) of this subpart that equals or exceeds the rate of basic pay the administrative appeals judge received immediately before that date.

PART 536—GRADE AND PAY RETENTION

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AUTHORITY: 5 U.S.C. 5361-5366; sec. 4 of the Performance Management and Recognition System Termination Act of 1993, Pub. L. 103-89, 107 Stat. 981; § 536.405 also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92-502; § 536.308 also issued under section 301(d)(2) of the Federal Workforce Flexibility Act of 2004, Pub. L. 108-411, 118 Stat. 2305.

SOURCE: 45 FR 85656, Dec. 30, 1980, unless otherwise noted.

Subpart A—General Provisions

SOURCE: 70 FR 31305, May 31, 2005, unless otherwise noted.

§ 536.101 Purpose.

This part contains OPM regulations for the administration of grade and pay retention. This part supplements and implements the provisions of 5 U.S.C. 5361-5366 and must be read together with those sections of law. Under 5 U.S.C. 5362, an employee under a covered pay system who is placed in a lower grade (e.g., as a result of a reduction in force or when his or her position is reduced in grade as a result of a reclassification) is entitled to retain the grade held immediately before the reduction for a period of 2 years under the circumstances prescribed in this part. Under 5 U.S.C. 5363, an employee whose rate of basic pay otherwise would be reduced as a result of a management action is entitled to retain his or her rate of basic pay under the circumstances prescribed in this part.

§ 536.102 Coverage.

(a) Subject to the exclusions in paragraphs (b) through (e) of this section, this part covers any employee who, at the time this part is applied—

- (1) Is in a covered pay system; or
- (2) Is moving to a position under a covered pay system from a position not under a covered pay system, as long as the individual was an *employee* as defined in 5 CFR 536.103 while serving in

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the position in a noncovered pay system.

(b) An agency may not provide grade or pay retention under this part to an employee who—

(1) Is reduced in grade or pay for personal cause or at the employee's request;

(2) Was employed on a temporary or term basis immediately before the action causing the reduction in grade or pay;

(3) Does not satisfactorily complete the probationary period prescribed by 5 U.S.C. 3321(a)(2), and, as a result, is removed from a supervisory or managerial position;

(4) Is entitled to receive a saved rate of basic pay under 5 U.S.C. 3594(c) and 5 CFR 359.705 because of removal from the Senior Executive Service and placement in a civil service position (other than a Senior Executive Service position) under 5 U.S.C. 3594(b)(2);

(5) Moves from an Executive Schedule position paid under 5 U.S.C. chapter 53, subchapter II, or a position whose rate of pay is fixed by law at a rate equal to a rate for the Executive Schedule;

(6) Moves between positions not under a covered pay system or from a position under a covered pay system to a position not under a covered pay system;

(7) Moves to a nonappropriated fund position as described in 5 U.S.C. 2105(c) (except a position occupied by a prevailing rate employee); or

(8) Moves from a nonappropriated fund position as described in 5 U.S.C. 2105(c) (except a position occupied by a prevailing rate employee) to a position in a covered pay system, unless covered by § 536.302(a).

(c) An agency may not provide grade or pay retention under this part based on the grade or rate of basic pay held by the employee during a temporary promotion or temporary reassignment. However, a temporary promotion or temporary reassignment does not affect an employee's preexisting entitlement to grade or pay retention.

(d) An agency may not provide grade retention under subpart B of this part to an employee who moves from a position not under a covered pay system to a position under a covered pay system.

(e) An employee loses eligibility for or entitlement to grade or pay retention under the conditions specified in §§ 536.207, 536.208, and 536.308.

§ 536.103 Definitions.

For the purpose of this part:

Authorized agency official means the head of the agency or an official who is authorized to act for the head of the agency in the matter concerned.

Covered pay system means a covered pay schedule as defined in 5 U.S.C. 5361(5)—*i.e.*, the General Schedule pay system established under 5 U.S.C. chapter 53, subchapter III; a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV; or a special occupational pay system established under 5 U.S.C. chapter 53, subchapter IX. The various prevailing rate systems under 5 U.S.C. chapter 53, subchapter IV, are considered separate systems if they have separate job grading structures.

Employed on a temporary or term basis means employment under an appointment having a definite time limitation or designated as temporary or term.

Employee has the meaning given that term in 5 U.S.C. 2105, except that *employee* also includes—

(1) An individual employed by the U.S. Postal Service or the Postal Rate Commission who would be considered an employee under 5 U.S.C. 2105 but for the exclusion in section 2105(e); and

(2) An individual employed by a Department of Defense or Coast Guard nonappropriated fund instrumentality (as described in 5 U.S.C. 2105(c)) who is moved without a break in service of more than 3 days from employment in such an instrumentality to a position under a covered pay system in the same agency.

FEPCA means the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101–509, November 5, 1990, as amended).

General Schedule or *GS* means the classification and pay system established under 5 U.S.C. chapter 51 and subchapter III of chapter 53. This term also refers to the pay schedule established under 5 U.S.C. 5332.

Highest applicable rate range means the rate range applicable to an employee based on a given position of

record and official worksite that provides the highest rates of basic pay, excluding any retained rates. For example, a rate range of special rates under 5 U.S.C. 5305 may exceed an applicable locality rate range under 5 U.S.C. 5304 for General Schedule employees. In certain circumstances, the *highest applicable rate range* may consist of two types of pay rates from different pay schedules—e.g., a range where special rates are higher in the lower portion of the range and locality rates are higher in the higher portion of the range.

Management action means an action (not for personal cause) by an agency official not initiated or requested by an employee which may adversely affect the employee's grade or rate of basic pay. However, an employee's placement in or transfer to a position under a formal employee development program established by an agency for recruitment and employee advancement purposes (e.g., Career Intern Program) is considered a management action even though the employee initiates or requests such placement or transfer.

Official worksite means the official location of the employee's position of record as determined under the rules of the applicable pay system (e.g., 5 CFR 531.605 for General Schedule employees). *Official worksite* is synonymous with the term "official duty station" as used in 5 U.S.C. 5363(c).

OPM means the Office of Personnel Management.

Payable rate means the highest rate of basic pay to which an employee is entitled based on the employee's position of record, official worksite, and step (or relative position in range for a GM employee) or, if applicable, a retained rate.

Pay schedule means a set of rate ranges established under a single authority—i.e., the General Schedule, a law enforcement officer special base rate schedule (for grades GS-3 through 10) under section 403 of FEPCA; a prevailing rate schedule (including a special schedule or special rate schedule) under 5 U.S.C. chapter 53, subchapter IV; a locality rate schedule under 5 U.S.C. 5304 based on GS rates; a locality rate schedule under 5 U.S.C. 5304 based on law enforcement officer special base rates (for grades GS-3

through 10); or a special rate schedule under 5 U.S.C. 5305 or similar authority. A pay schedule applies to or covers a defined category of employees based on established coverage conditions (e.g., official worksite, occupation). A pay schedule is considered to apply to or cover an employee who meets the established coverage conditions even when a rate under that schedule is not currently payable to the employee because of a higher pay entitlement under another pay schedule.

Position of record means an employee's official position (defined by grade or level, occupational series, employing agency, law enforcement officer status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and the current position description, excluding any position to which an employee is temporarily detailed. A retained grade is considered to be part of an employee's position of record even though the actual grade of the employee's position is a lower grade, except as provided in § 536.205(b). For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

Prevailing rate employee has the meaning given that term in 5 U.S.C. 5342(a)(2) and refers to an employee in a position covered by a prevailing rate system or schedule established under 5 U.S.C. chapter 53, subchapter IV.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions, including a General Schedule rate under 5 U.S.C. 5332; a law enforcement officer special base rate under section 403 of FEPCA; a special rate under 5 CFR part 530, subpart C, or similar payment under other legal authority; a locality rate under 5 CFR part 531, subpart F, or

similar payment under other legal authority; a prevailing rate under 5 U.S.C. 5343; or a retained rate under this part, but excluding additional pay of any other kind (such as premium payments, differentials, and allowances).

Rate range or *range* means the range of rates of basic pay for a grade within an established pay schedule, excluding any retained rate.

Reasonable offer means an offer that meets the conditions in § 536.104.

Reduced in grade or pay at the employee's request means a reduction in grade or rate of basic pay that is initiated by the employee for his or her benefit, convenience, or personal advantage. A reduction in grade or pay that is caused or influenced by a management action is not considered to be at an employee's request, except that the voluntary reduction in grade or pay of an employee in response to a management action directly related to personal cause is considered to be at the employee's request.

Reduced in grade or pay for personal cause means a reduction in grade or rate of basic pay based on the conduct, character, or unacceptable performance of an employee. In situations in which an employee is reduced in grade or pay for inability to perform the duties of his or her position because of a medical or physical condition beyond the employee's control, the reduction in grade is not considered to be for personal cause.

Reorganization means the planned elimination, addition, redistribution, or restructuring of functions or duties either wholly within an agency or between agencies.

Representative rate means—

(1) For the purpose of comparing grades that are under different covered pay systems under § 536.105 and after applying any applicable geographic conversion under § 536.105(b) for positions with different official worksites—

(i) The highest rate of basic pay that applies to the fourth step of the grade for a position covered by the General Schedule; and

(ii) The highest rate of basic pay that applies to the second step of the grade of a position under a regular prevailing rate system established under 5 U.S.C.

chapter 53, subchapter IV, or, in the case of a prevailing rate position with a single rate, the single rate of basic pay for that position; and

(2) For the purpose of comparing grades or levels of work in making reasonable offer determinations when one of the grades or levels of work is not under a covered pay system and after applying any applicable geographic conversion rules under § 536.105(b) for positions with different official worksites—

(i) The maximum payable rate of basic pay that applies to the grade of a position covered by the General Schedule;

(ii) The maximum payable rate of basic pay that applies to the grade of a position under a regular prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV, or in the case of a prevailing rate position with a single rate, the single rate of basic pay for that position; and

(iii) The maximum payable rate of basic pay that applies to the grade or level of work in the case of a position not covered by paragraph (2)(i) or (ii) of this definition. In the case of a position with a single rate under such a schedule, the single rate of basic pay for that position is the representative rate.

Retained rate means a rate above the maximum rate of the employee's highest applicable rate range that is payable under subpart C of this part.

Temporary promotion means a promotion that has a definite time limitation or is otherwise designated as temporary when the affected employee is informed in advance.

Temporary reassignment means a reassignment that has a definite time limitation or is otherwise designated as temporary when the affected employee is informed in advance.

Where different pay schedules apply means, in the context of applying the geographic conversion rule, that an employee's official worksite is changed to a new location that would cause the employee to lose or gain coverage under a location-based pay schedule if the employee were to remain in the same position of record.

§ 536.104 Reasonable offer.

(a) For the purpose of determining whether grade retention eligibility or entitlement must be terminated under § 536.207 or 536.208, the offer of a position is a reasonable offer if the position's grade is equal to or higher than the retained grade and if all the conditions in paragraph (c) of this section are met. If the offered position is in a different pay system, § 536.105 must be applied to determine whether the grade of the offered position is equal to or greater than the retained grade.

(b) For the purpose of determining whether pay retention eligibility or entitlement must be terminated under § 536.308, the offer of a position is a reasonable offer if the employee's rate of basic pay in the position would be equal to or greater than the rate to which the employee is or would be entitled under the pay retention provisions and if all the conditions in paragraph (c) of this section are met.

(c) An offer of a position must meet the following additional conditions to qualify as a reasonable offer:

(1) The offer must be in writing and must include an official position description of the offered position;

(2) The offer must inform the employee that entitlement to grade or pay retention will terminate if the offer is declined and that the employee may appeal the reasonableness of the offer as provided in § 536.402;

(3) The offered position must be of equal or greater tenure than the employee's position before the action resulting in the grade or pay retention entitlement;

(4) The offered position must be full-time, unless the employee's position immediately before the action resulting in entitlement to grade or pay retention was less than full-time, in which case the offered position must have a work schedule providing for no fewer hours of work per week or per pay period than the position held before the action; and

(5) The offered position must be in the same commuting area as the employee's position immediately before the offer, unless the employee is subject to a mobility agreement or a published agency policy that requires employee mobility.

§ 536.105 Comparing grades under different pay systems.

(a) *General.* An agency must compare the representative rates (as defined in § 536.103) of the applicable grades to determine whether a grade of a position is equal to, higher than, or lower than the grade of another position when—

(1) Determining eligibility for grade retention upon movement from a position under a covered pay system to a lower-graded position under a different covered pay system (including determinations under § 536.203 that involve different covered pay systems);

(2) Determining whether grade retention eligibility is lost or grade retention is terminated when an employee is placed in a lower-graded position under a different covered pay system and the action is taken for personal cause or at the employee's request;

(3) Determining whether grade retention eligibility is lost or grade retention is terminated based on movement to a position under a different covered pay system with an equal or higher grade;

(4) Determining whether grade retention eligibility is lost or grade retention is terminated based on declination of a reasonable offer of a position under a different pay system with an equal or higher grade; and

(5) Determining whether pay retention eligibility is lost or a retained rate is terminated when an employee is placed in a lower-graded position under a different covered pay system and the action is taken for personal cause or at the employee's request.

(b) *Geographic conversion.* When comparing positions under paragraph (a) of this section which are stationed in different geographic locations where different pay schedules apply, the representative rate of the employee's existing position of record (as in effect before the movement to a position in a different pay system) must be determined as if the official worksite of that position of record were the same as the official worksite of the new or offered position of record. Geographic conversion is not necessary for the purpose of comparing grades if an employee is being moved to (or given a reasonable

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offer of) a position under the same covered pay system (*i.e.*, same grading structure).

Subpart B—Grade Retention

SOURCE: 70 FR 31305, May 31, 2005, unless otherwise noted.

§ 536.201 Mandatory grade retention.

(a) Subject to the requirements in this section and in §§ 536.102 and 536.203, an agency must provide grade retention to an employee who moves from a position under a covered pay system to a lower-graded position under a covered pay system as a result of—

- (1) Reduction in force procedures, or
- (2) A reclassification process.

(b) An agency must apply § 536.105 in determining whether a position under a different covered pay system is a lower-graded position.

(c) An employee's movement to a lower-graded position is considered to be the result of reduction in force procedures when the employee has received a specific reduction in force notice and—

(1) The employee is placed in the position offered in the notice; or

(2) The employee is placed in a position other than that offered in the notice but in the same agency, if the position was offered in writing and at the initiative of management.

(d) An employee's movement to a lower-graded position is considered to be the result of a reclassification process when—

(1) The employee remains in his or her position after it is reclassified; or

(2) The employee is placed in a different position in the same agency before the effective date of the reclassification action, if the position was offered in writing and at the initiative of management after the employee received a specific written notice that the position would be reclassified to a lower grade.

(e) Notwithstanding paragraph (a) of this section, an agency must provide grade retention to an employee who moves without a break in service of more than 3 days from a position in a Department of Defense or Coast Guard nonappropriated fund instrumentality (as defined in 5 U.S.C. 2105(c)) to a posi-

tion under a covered pay system in the same agency.

§ 536.202 Optional grade retention.

(a) Subject to the requirements in §§ 536.102 and 536.203, an authorized agency official may provide grade retention to an employee moving from a position under a covered pay system to a lower-graded position under a covered pay system when—

(1) Management announces a reorganization or reclassification decision in writing (including a general notice or a specific notice) that may or would affect the employee; and

(2) The employee moves to a lower-graded position (either at the employee's initiative or in response to a management-initiated offer) on or before the date the announced reorganization or reclassification is effected.

(b) An agency must apply § 536.105 in determining whether a position under a different covered pay system is a lower-graded position.

(c) When an employee is offered a position with grade retention under this section in anticipation of a reduction in grade, the agency must inform the employee in writing that acceptance of the position is not required and that declination of the offer will not affect the employee's entitlement to grade retention under § 536.201 if the agency actually moves the employee to the lower-graded position.

(d) Notwithstanding paragraph (a) of this section, an agency may provide grade retention to an employee who is moved without a break in service of more than 3 days from a position in a Department of Defense or Coast Guard nonappropriated fund instrumentality (as defined in 5 U.S.C. 2105(c)) to a position under a covered pay system in the same agency.

§ 536.203 Additional eligibility requirements for grade retention.

(a) An employee is eligible for grade retention under § 536.201(a)(1) only if the employee has served for at least 52 consecutive weeks in one or more positions under a covered pay system at one or more grades higher than the grade of the position in which the employee is being placed. Such service is deemed to include service performed by

an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard (as defined in 5 U.S.C. 2105(c)) who is moved to a position in the civil service employment system of the Department of Defense or the Coast Guard, respectively, without a break in service of more than 3 days.

(b) An employee is eligible for grade retention under § 536.201(a)(2) based on a reclassification of his or her position only if, immediately before the reduction in grade, that position was classified at the existing grade or a higher grade for a continuous period of at least 1 year.

(c) An employee is eligible for grade retention under § 536.202 only if, immediately before being placed in the lower grade, the employee has served for at least 52 consecutive weeks in one or more positions under a covered pay system at one or more grades higher than that lower grade. Such service is deemed to include service performed by an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard (as defined in 5 U.S.C. 2105(c)) who is moved to a position in the civil service employment system of the Department of Defense or the Coast Guard, respectively, without a break in service of more than 3 days.

(d) Eligibility for grade retention under § 536.201 or 536.202 ceases under the conditions specified in § 536.207.

§ 536.204 Period of grade retention.

(a) Unless grade retention is terminated under § 536.208, an employee is entitled to retain the grade held immediately before the action that provides entitlement to grade retention for 2 years beginning on the date the employee is placed in the lower-graded position.

(b) During the 2-year period of grade retention, if an agency further reduces an employee in grade under circumstances also entitling the employee to grade retention, the employee must continue to retain the previous retained grade for the remainder of the first 2-year period. At the end of the first 2-year period, the employee is entitled to retain the grade of the position from which the second reduction

in grade was made for 2 years following the effective date of the second reduction in grade.

(c) Notwithstanding § 536.207(a)(1), grade retention continues to apply to an employee serving under an interim appointment made under 5 CFR 772.102 for the duration of the original 2-year grade retention period if the employee's grade was retained under this part in the appointment immediately preceding the interim appointment.

§ 536.205 Applicability of retained grade.

(a) Except as provided in paragraph (b) of this section, an agency must treat an employee's retained grade as the employee's grade for all purposes, including pay and pay administration, premium pay, retirement, life insurance, and eligibility for training. If the employee's actual position of record is under a different covered pay system than the covered pay system associated with the retained grade, the agency also must treat the employee as being under the covered pay system associated with the retained grade for the same purposes.

(b) An agency may not use an employee's retained grade—

(1) In any reduction in force procedure;

(2) To determine whether an employee has been reduced in grade for the purpose of terminating grade or pay retention (*i.e.*, based on personal cause or at the employee's request);

(3) To determine whether an employee retains status as a GM employee (as defined in 5 CFR 531.203); or

(4) To determine whether an employee is exempt or nonexempt from the Fair Labor Standards Act of 1938, as amended.

§ 536.206 Determining an employee's rate of basic pay under grade retention.

(a) *General.* (1) When an employee becomes entitled to grade retention or becomes covered by one or more different pay schedules (because of a change in the employee's position of record, a change in the employee's official worksite, or the establishment of a new pay schedule) during a period of grade retention, the agency must apply

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the rules in this section to determine the employee's rate of basic pay.

(2) This section does not apply to an employee whose entitlement to grade retention is terminated under one of the conditions in § 536.208. (See § 536.208(d).)

(b) *Preexisting rate within a range.* If an employee is entitled to a rate of basic pay within the applicable rate range before the action resulting in application of this section, the employee is entitled to the rate(s) of basic pay in the applicable pay schedule(s) for the employee's position of record after the action (including the retained grade) which correspond to the employee's grade and step (or rate) immediately before the action. The employee's payable rate is the corresponding rate in the highest applicable rate range for the employee's position of record after the action (including the retained grade). If an employee's rate of basic pay otherwise would be reduced because of placement under a lower-paying pay schedule (excluding any reduction that results from a geographic conversion), the employee would be eligible for pay retention under subpart C of this part to the same extent as other employees holding the same position of record whose actual grade is the same as the employee's retained grade.

(c) *Preexisting retained or saved rate.*

(1) If an employee is entitled to a retained rate immediately before the action resulting in application of this section, the agency must determine the employee's payable rate of basic pay under §§ 536.303 and 536.304.

(2) If an employee is entitled to a saved rate under 5 CFR 359.705, the agency must determine the employee's payable rate of basic pay under that section.

(d) *Order of processing pay actions.* When an action resulting in application of this section takes effect on the same effective date as other pay actions that affect an employee's rate of basic pay (e.g., within-grade increase), the actions will be processed in the order prescribed in the rules governing the covered pay system of the employee's position of record (e.g., 5 CFR 531.206 for GS positions and 5 CFR 532.413 for Federal Wage System positions).

§ 536.207 Loss of eligibility for grade retention.

(a) Eligibility for grade retention as a result of an entitlement under § 536.201 ceases if any of the following conditions occurs at any time after the employee receives written notice of the reduction in grade, but before the commencement of the 2-year period of grade retention:

(1) The employee has a break in service of 1 workday or more;

(2) The employee is reduced in grade for personal cause or at the employee's request (based on the actual grade of the employee's position rather than the employee's retained grade and, when a movement to a different covered pay system is involved, a comparison of representative rates under § 536.105);

(3) The employee moves to a position under a covered pay system with a grade that is equal to or higher than the retained grade (as determined under § 536.105), excluding a temporary promotion;

(4) The employee declines a reasonable offer of a position with a grade equal to or higher than the retained grade (as determined under §§ 536.104 and 536.105);

(5) The employee elects in writing to terminate the benefits of grade retention; or

(6) The employee moves to a position not under a covered pay system.

(b) Eligibility for grade retention as a result of entitlement under § 536.202 ceases if any of the following conditions occurs at any time after management informs the employee of an impending reorganization or reclassification that will or could result in a reduction in grade, but before the commencement of the 2-year period of grade retention:

(1) Any of the conditions listed in paragraph (a) of this section except that an employee's request for placement in a lower-graded position, in lieu of displacing another employee at his or her grade under reduction in force procedures, is not a declination of a reasonable offer for grade retention purposes; or

(2) The employee fails to enroll in, or to comply with reasonable written requirements established to assure full

consideration under, a program providing priority consideration for placement.

(c) If an employee loses eligibility for grade retention under this section, the employee's rate of basic pay must be set in accordance with the pay-setting rules and pay rates applicable to the employee's position of record (e.g., 5 CFR part 531, subpart B, for GS positions). An employee is not eligible for pay retention under subpart C of this part based on an action that provided eligibility for grade retention if the employee elects to terminate mandatory eligibility for grade retention under paragraph (a)(5) of this section.

§ 536.208 Termination of grade retention.

(a) Grade retention under § 536.201 terminates if any of the conditions listed in § 536.207(a) occurs after commencement of the 2-year period of grade retention.

(b) Grade retention under § 536.202 terminates if any of the conditions listed in § 536.207(b) occurs after the commencement of the 2-year period of grade retention.

(c) Termination of grade retention benefits takes effect—

(1) At the end of the day before placement if the termination is the result of the employee's placement in another position; or

(2) At the end of last day of the pay period in which the employee—

(i) Declines a reasonable offer;

(ii) Elects to terminate grade retention benefits; or

(iii) Fails to enroll in, or comply with reasonable written requirements established to assure full consideration under, a program providing priority consideration for placement.

(d) If an employee's entitlement to grade retention terminates under this section, the employee's rate of basic pay must be set in accordance with the pay-setting rules and pay rates applicable to the employee's position of record (e.g., 5 CFR part 531, subpart B, for GS positions). An employee is not entitled to pay retention under subpart C of this part based on a reduction in basic pay resulting from waiver of the employee's grade retention entitlement under § 536.207(a)(5).

Subpart C—Pay Retention

SOURCE: 70 FR 31310, May 31, 2005, unless otherwise noted.

§ 536.301 Mandatory pay retention.

(a) Subject to the requirements in § 536.102 and this section, an agency must provide pay retention to an employee in a position under a covered pay system whose payable rate of basic pay otherwise would be reduced (after application of any applicable geographic conversion under § 536.303(a)) as a result of—

(1) The expiration of the 2-year period of grade retention under subpart B of this part;

(2) A reduction in force or reclassification action that places an employee in a lower-graded position when the employee does not meet the eligibility requirements for grade retention under subpart B of this part;

(3) A management action that places an employee in a non-special rate position or in a lower-paid special rate position from a special rate position;

(4) A management action that places an employee under a different pay schedule;

(5) A management action that places an employee in a formal employee development program generally utilized Governmentwide, such as upward mobility, apprenticeship, and career intern programs;

(6) The application of the promotion rule for GS employees under 5 U.S.C. 5334(b) and 5 CFR 531.214 when the employee's payable rate of basic pay after promotion exceeds the maximum rate of the highest applicable rate range;

(7) The application of the promotion rule for prevailing rate employees under 5 CFR 532.407 when the employee's payable rate of basic pay after promotion exceeds the maximum scheduled rate of the grade, as described in 5 CFR 532.407(b);

(8) A reduction or elimination of scheduled rates, special schedules, or special rate schedules, excluding—

(i) A statutory reduction in scheduled rates of pay under the General Schedule, including a reduction authorized under 5 U.S.C. 5303(b); or

(ii) A statutory reduction in a prevailing rate schedule established under

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5 U.S.C. chapter 53, subchapter IV, and 5 CFR part 532.

(b) If an employee's official worksite changes in conjunction with an action that may entitle the employee to pay retention under paragraph (a) of this section, the agency must apply the geographic conversion rule in § 536.303(a) before determining whether an employee's rate of basic pay otherwise would be reduced.

(c) An employee is considered "placed" under paragraph (a)(2), (3), (4), and (5) of this section only when the employee remains in a position in the same agency. Optional pay retention under § 536.302 may apply when an employee transfers to a different agency as a result of a reduction in force or reclassification action or is selected by a different agency to fill a position under a formal employee development program, if all other qualifying conditions are met.

(d) Eligibility for pay retention under this section ceases under the conditions specified in § 536.308.

§ 536.302 Optional pay retention.

(a) Subject to the requirements in § 536.102 and this section, an authorized agency official may provide pay retention to an employee not entitled to pay retention under § 536.301, but whose payable rate of basic pay otherwise would be reduced (after application of any applicable geographic conversion under § 536.303(a)) as the result of a management action. This includes a management action to move an employee's position, without a break in service of more than 3 days, from a Department of Defense or Coast Guard nonappropriated fund instrumentality (as defined in 5 U.S.C. 2105(c)) to a position under a covered pay system in the same agency.

(b) If an employee's official worksite changes in conjunction with an action that may entitle the employee to pay retention under paragraph (a) of this section, the agency must apply the geographic conversion rule in § 536.303(a) before determining whether an employee's rate of basic pay otherwise would be reduced.

(c) Eligibility for pay retention under this section ceases under the conditions specified in § 536.308.

§ 536.303 Geographic conversion.

(a) *Geographic conversion at time of action that may provide initial entitlement to pay retention.* If, in conjunction with a pay action that may entitle the employee to pay retention under §§ 536.301 or 536.302, an employee's official worksite is changed to a new location where different pay schedules apply, the agency must convert the employee's rate(s) of basic pay to the applicable pay schedule(s) in the new location before applying the pay retention rules in this subpart or any other simultaneous pay action (other than a general pay adjustment). The agency must identify the highest applicable rate range that would apply to the employee's position of record before the pay action as if that position were stationed at the new official worksite and determine the employee's converted payable rate of basic pay based on the step (or rate) in that range that corresponds to the employee's step (or rate) before the pay action. A reduction in an employee's payable rate of basic pay resulting from this geographic conversion is not a basis for entitlement to pay retention. The pay retention rules in this subpart must be applied as if the employee's payable rate of basic pay after geographic conversion is the employee's existing payable rate of basic pay in effect immediately before the action.

(b) *Geographic conversion when a retained rate employee's official worksite is changed.* When an employee is receiving a retained rate and the employee's official worksite is changed to a new location where different pay schedules apply, the agency must apply the following rules (after applying any simultaneous general pay adjustment under § 536.305) to derive the converted retained rate that will be used as the existing retained rate in determining the employee's pay retention entitlement in the new position of record and at the new official worksite:

(1) Identify the maximum rate for the highest applicable rate range that applies to the employee's former position of record based on the former official worksite;

(2) Identify the maximum rate for the highest applicable rate range that would apply to the employee's former

position of record if the employee were stationed at the official worksite for the new position of record;

(3) Divide the maximum rate identified in paragraph (b)(2) of this section by the maximum rate identified in paragraph (b)(1) of this section and round the result to the fourth decimal place; and

(4) Multiply the factor resulting from paragraph (b)(3) of this section by the employee's former retained rate and round to the nearest whole dollar (for an annual rate) or the nearest whole cent (for an hourly rate) to derive the employee's converted retained rate at the new official worksite.

§ 536.304 Determining an employee's pay retention entitlement.

(a) *General.* (1) When an employee becomes entitled to pay retention under § 536.301 or 536.302 or undergoes a change in his or her position of record or pay schedule while receiving a retained rate (when the terminating conditions for pay retention under § 536.308 do not apply), the agency must determine the employee's pay retention entitlement following the rules in this section.

(2) Any general pay adjustment (including a retained rate adjustment under § 536.305) that takes effect on the same date as an action described in paragraph (a)(1) of this section must be processed first, before any other pay action and before applying the rules in paragraphs (a)(3), (a)(4), (b), or (c) of this section, as applicable.

(3) If the location of an employee's official worksite changes in conjunction with an action that may provide initial entitlement to pay retention, the agency must apply the geographic conversion rule under § 536.303(a) before applying the rules in paragraph (b) of this section. The converted rate of basic pay must be treated as the employee's existing payable rate of basic pay in applying those rules.

(4) If the location of an employee's official worksite changes while he or she is receiving a retained rate, the agency must apply the geographic conversion rule under § 536.303(b) before applying the rules in paragraph (c) of this section. The converted retained rate must be treated as the employee's ex-

isting retained rate in applying those rules.

(5) When an employee's pay retention entitlement is established or redetermined under this section on the same effective date as other pay actions that affect an employee's rate of basic pay, the actions must be processed in the order prescribed under the rules governing the covered pay system of the employee's position of record (e.g., 5 CFR 531.206 for GS positions and 5 CFR 532.413 for Federal Wage System positions).

(6) In applying this section, an agency must convert an employee's existing annual rate of pay to an hourly rate of pay if the employee's new position is under a pay system that uses only hourly rates. An agency must convert an employee's existing hourly rate of pay to an annual rate of pay if the employee's new position is under a pay system that uses annual rates of pay.

(b) *Determining initial pay retention entitlement.* When an employee becomes entitled to pay retention under § 536.301 or 536.302, the agency must determine the employee's pay retention entitlement under the following rules (subject to the requirements in paragraph (a) of this section):

(1) If an employee's existing payable rate of basic pay is less than or equal to the maximum rate of the highest applicable rate range for the grade of the employee's position of record immediately after the event causing the pay retention entitlement, the employee is entitled to the lowest rate of basic pay in such rate range that equals or exceeds the employee's existing payable rate of basic pay. If an employee's payable rate of basic pay is set at or below the maximum rate of the highest applicable rate range, pay retention under this subpart ceases to apply to the employee.

(2) If the employee's existing payable rate of basic pay is greater than the maximum rate of the highest applicable rate range for the grade of the employee's position immediately after the event causing the pay retention entitlement, the employee is entitled to a retained rate equal to the employee's existing payable rate of basic pay, subject to the limitations in paragraph (b)(3) of this section.

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(3) A newly established retained rate may not exceed—

(i) 150 percent of the maximum payable rate of basic pay of the highest applicable rate range for the grade of the employee's position of record; or

(ii) The Executive Level IV maximum rate limitation established under § 536.306.

(4) In applying this section for an employee who becomes eligible for pay retention while serving on a temporary promotion or temporary reassignment, the agency must use the rate of basic pay the employee would have received if the temporary promotion or temporary reassignment had not occurred.

(c) *Redetermining pay retention entitlement at time of change in position or pay schedule.* When an employee receiving a retained rate undergoes a change in position or pay schedule that results in a new highest applicable rate range (and when the terminating conditions for pay retention under § 536.308(a)(1), (3), (4), and (5) do not apply), the agency must determine the employee's pay retention entitlement under the following rules (subject to the requirements in paragraph (a) of this section):

(1) If the employee's grade and pay system are not changing and if the employee's existing retained rate is less than or equal to the maximum rate of the highest applicable rate range for the employee's position of record immediately after the position or schedule change, the employee is entitled to the maximum rate of the highest applicable rate range, and pay retention ceases to apply.

(2) If the employee's grade and pay system are not changing and if the employee's existing retained rate is greater than the maximum rate on the highest applicable rate range for the employee's position of record immediately after the position or schedule change, the employee continues to be entitled to the existing retained rate.

(3) If the employee's pay system is not changing but the employee is being promoted to a higher-graded position, the agency must apply the applicable promotion rules to determine the employee's payable rate of basic pay (e.g., the rules in 5 CFR 531.214(d)(5) for GS positions and 5 CFR 532.407 for Federal Wage System positions). When the re-

sulting rate is equal to or greater than the existing retained rate, pay retention ceases to apply. When the resulting rate is less than the existing retained rate, the employee continues to be entitled to the existing retained rate.

(4) If the employee is moving to a position under a different covered pay system whose grade has a higher representative rate, the agency must apply the applicable pay administration rules to determine the employee's payable rate of basic pay (e.g., part 531, subpart B, for GS positions and part 532 for Federal Wage System provisions). When the resulting rate is equal to or greater than the existing retained rate, pay retention ceases to apply to the employee. When the resulting rate is less than the existing retained rate, the employee continues to be entitled to the existing retained rate.

(5) In applying this section to a retained rate employee who receives a temporary promotion or temporary reassignment, the temporary promotion or temporary reassignment is not a basis for permanently terminating an employee's pay retention entitlement. When the temporary promotion or temporary reassignment ends, the employee's pay retention entitlement will be determined as if the employee had not received the temporary promotion or temporary reassignment.

(6) Notwithstanding § 536.308(a)(1), an agency must continue a retained rate entitlement for an employee serving under an interim appointment made under 5 CFR 772.102 if the employee's pay was retained under this subpart under the appointment immediately preceding the interim appointment.

§ 536.305 Adjusting an employee's retained rate when a pay schedule is adjusted.

(a)(1) Except as otherwise provided in this section, when the maximum rate of the highest applicable rate range for an employee's position of record is increased while the employee is receiving a retained rate, the employee is entitled to 50 percent of the amount of the increase in that maximum rate, subject to the maximum rate limitation in § 536.306. This 50-percent adjustment rule applies only when the maximum

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rate increases are attributable to the adjustment of the employee's existing pay schedule or the establishment of a new pay schedule that covers the employee's existing position of record.

(2) As provided in 5 CFR 531.206, a retained rate adjustment under paragraph (a)(1) of this section is a general pay adjustment that must be applied before any geographic conversion under § 536.303(b) or any other simultaneous pay action. The retained rate adjustment under paragraph (a)(1) of this section must be determined based on the employee's position of record and official worksite as in effect immediately before the effective date of the adjustment.

(3) Consistent with 5 U.S.C. 5363(c), a change in the maximum rate of the highest applicable rate range based on a change in the employee's official worksite is not considered in applying paragraph (a)(1) of this section. The employee's new retained rate must be determined under the geographic conversion rule in § 536.303(b).

(4) Paragraph (a)(1) of this section does not apply to an increase in an employee's highest applicable rate range that results from a change in the employee's position of record. Such an increase is not attributable to an adjustment in the pay schedule applicable to the employee's position and thus is not an increase as described in 5 U.S.C. 5363(b)(2)(B).

(b) When a pay schedule adjustment causes an employee's retained rate (after any adjustment under this section) to become equal to or lower than the maximum rate of the highest applicable rate range for the grade of the employee's position, the employee is entitled to the maximum rate of the highest applicable rate range, and pay retention ceases to apply.

§ 536.306 Limitation on retained rates.

(a) A retained rate may not at any time exceed the rate payable for level IV of the Executive Schedule.

(b) When an employee's retained rate is limited under this section, an agency may not apply this subpart or the provisions of any other law or regulation to the rate of basic pay the employee

would have received but for this limitation.

§ 536.307 Treatment of a retained rate as basic pay for other purposes.

(a) A retained rate is considered to be an employee's rate of basic pay for the purpose of computing or applying—

(1) Retirement deductions, contributions, and benefits under 5 U.S.C. chapters 83 and 84;

(2) Life insurance premiums and benefits under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, and 5 CFR part 532 and part 550, subparts A and I;

(4) Severance pay under 5 U.S.C. 5595 and 5 CFR part 550, subpart G;

(5) Post differentials under 5 U.S.C. 5925 and danger pay allowances under 5 U.S.C. 5928;

(6) Nonforeign area cost-of-living allowances and post differentials under 5 U.S.C. 5941(a) and 5 CFR part 591, subpart B;

(7) Lump-sum payments for accumulated and annual leave under 5 CFR part 550, subpart L;

(8) General Schedule pay administration provisions (e.g., promotion increases) to the extent provided in 5 CFR part 531, subpart B;

(9) Pay administration provisions for prevailing rate employees to the extent provided in 5 CFR part 532;

(10) Other provisions as specified in other statutes or OPM regulations; and

(11) Payments and benefits equivalent to those listed in this section under other legal authorities, as determined by the head of the agency or other authorized official responsible for administering such payments or benefits.

(b) For the purpose of applying other laws and regulations not listed in paragraph (a) of this section to an employee receiving a retained rate, the employee's rate of basic pay is deemed to be the applicable maximum rate of basic pay for the employee's position of record (e.g., the maximum rate of basic pay for a locality rate range or special rate range, as applicable, for the purpose of computing a percentage-based award under 5 CFR 451.104(g)).

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§ 536.308 Loss of eligibility for or termination of pay retention.

(a) Eligibility for pay retention ceases if any of the following conditions occurs at any time after the employee has received written notification that the employee's pay will be reduced, and entitlement to pay retention terminates if any of the following conditions occurs after the commencement of pay retention:

(1) The employee has a break in service of 1 workday or more;

(2) The employee is entitled to a rate of basic pay under a covered pay system which is equal to or greater than the employee's retained rate (after applying any applicable geographic conversion under paragraph (b) of this section), excluding a rate resulting from a temporary promotion or temporary reassignment;

(3) The employee declines a reasonable offer (as determined under § 536.104) of a position in which the employee's rate of basic pay would be equal to or greater than the employee's retained rate (after applying any applicable geographic conversion under paragraph (b) of this section);

(4) The employee is reduced in grade for personal cause or at the employee's request (based on the actual grade of the employee's position rather than the employee's retained grade and, when a movement to a different covered pay system is involved, a comparison of representative rates under § 536.105); or

(5) The employee moves to a position not under a covered pay system.

(b) When the rate comparison required by paragraph (a)(2) or (3) of this section involves a new or offered position that is located in a different geographic area where different pay schedules would apply to the employee's existing position of record, the agency must convert the employee's existing retained rate using the geographic conversion rules in § 536.303(b) before making the rate comparison. The converted retained rate must be compared to the payable rate of basic pay for the new or offered position in determining whether the rate of basic pay for an offered position is equal to or higher than the employee's retained rate.

(c) Termination of pay retention benefits takes effect—

(1) At the end of the day before placement if the termination is the result of the employee's placement in another position; or

(2) At the end of the last day of the pay period in which the employee declines a reasonable offer.

(d) If an employee's eligibility for pay retention ceases or entitlement to pay retention terminates under this section, the employee's rate of basic pay must be set using the pay-setting rules applicable to the employee's position of record (e.g., 5 CFR part 531, subpart B, for GS positions). However, when an employee's retained rate is terminated under paragraph (a)(2) or (3) of this section and the employee's grade is unchanged, the employee's payable rate of basic pay may not be set below the maximum rate of the highest applicable rate range.

§ 536.309 Converting retained rates on May 1, 2005.

(a) Consistent with section 301(d)(2) of Public Law 108-411, an agency must convert an employee's retained rate or similar rate, as described in paragraph (b) of this section, to a retained rate under this subpart on May 1, 2005. The new retained rate must equal the retained rate in effect on April 30, 2005, as adjusted to include any applicable locality payment under 5 U.S.C. 5304 or similar provision of law.

(b) This section applies to an employee under a covered pay system who, on April 30, 2005, was receiving—

(1) A retained rate under 5 U.S.C. 5363;

(2) A rate paid under the authority of 5 U.S.C. 5334(b) or 5 U.S.C. 5362 which was greater than the maximum rate of basic pay payable for the grade of the employee's position of record; or

(3) A continued rate of pay under 5 CFR part 531, subpart C or G (as contained in the January 1, 2005, edition of title 5, Code of Federal Regulations, parts 1 to 699) which was greater than the maximum rate of basic pay payable for the grade of the employee's position.

(c) The conversion rules in this section must be applied before any simultaneous pay action that takes effect on May 1, 2005.

Subpart D—Appeals and Miscellaneous Provisions

SOURCE: 45 FR 85656, Dec. 30, 1980. Redesignated at 70 FR 31310, May 31, 2005.

§ 536.401 Placement and classification plans.

(a) Agencies which employ individuals subject to this part are required to establish in writing placement and classification plans.

(b) The placement and classification plans must commit the agency to:

(1) Identify and correct classification errors; and

(2) Correct position management problems; and

(3) Carry out specific planned efforts to place employees subject to this part; and

(4) Pursue placement efforts that do not adversely affect affirmative action goals.

[45 FR 85656, Dec. 30, 1980. Redesignated at 70 FR 31310, May 31, 2005.]

§ 536.402 Appeal of termination of benefits because of reasonable offer.

(a) Except as provided for in paragraph (e) of this section, an employee whose grade or pay retention benefits are terminated on the grounds the employee declined a reasonable offer of a position the grade or pay of which is equal to or greater than his or her retained grade or pay may appeal the termination to the Office of Personnel Management.

(b) An employee who appeals under this section shall file the appeal in writing with the Office of Personnel Management not later than 20 calendar days after being notified that his or her grade or pay retention benefits have been terminated, and shall state in the appeal the reasons why the employee believes the offer of a position was not a reasonable offer.

(c) The Office of Personnel Management may conduct any investigation or hearing it determines necessary to ascertain the facts of the case.

(d) If a decision by the Office of Personnel Management on an appeal under this section requires corrective action by an agency, including the retroactive or prospective restoration of grade or pay retention benefits, the agency shall take that corrective action.

(e) Termination of benefits based on a declination of a reasonable offer by an employee in an exclusively recognized bargaining unit may be reviewed under the negotiated grievance and arbitration procedures in accordance with chapter 71 of title 5, United States Code, and the terms of any applicable collective bargaining agreement. An employee in an exclusively recognized bargaining unit may not appeal a termination of benefits to the Office of Personnel Management if the grievance procedure of the agreement by which he or she is covered provides for this review.

(f) Decisions issued by the Office of Personnel Management shall be considered final decisions. OPM may, at its discretion, reconsider an original appellate decision when new and material information is presented, in writing, by the employee or the agency, which establishes a reasonable doubt as to the appropriateness of the original decision. The request must show that the information was not readily available when the decision was issued. A request for reconsideration of an original appeal decision must be submitted to OPM within 30 calendar days of the date of the original decision.

[45 FR 85656, Dec. 30, 1980, as amended at 50 FR 428, Jan. 4, 1985; 50 FR 45389, Oct. 31, 1985. Redesignated at 70 FR 31310, May 31, 2005]

§ 536.403 Documentation.

The application of the provisions of this part shall be documented in writing as a permanent part of the employee's Official Personnel Folder. As a minimum this documentation will include a copy of the letter described in § 536.404.

[45 FR 85656, Dec. 30, 1980. Redesignated and amended at 70 FR 31310, May 31, 2005.]

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§ 536.404 Issuance of employee letters.

When an employee is entitled to grade and/or pay retention, the employing agency shall give to the employee, with a copy of the Notification of Personnel Action (SF-50) documenting entitlement to grade and/or pay retention, a letter describing the circumstances warranting grade and/or pay retention, and the nature of that entitlement.

[45 FR 85656, Dec. 30, 1980. Redesignated at 70 FR 31310, May 31, 2005.]

§ 536.405 Availability of information.

(a) The Office, upon a request which identifies the individual from whose file the information is sought, shall disclose the following information from an appeal file to a member of the public, except when the disclosure would constitute a clearly unwarranted invasion of personal privacy:

(1) Confirmation of the name of the individual from whose file the information is sought and the names of the other parties concerned;

(2) The status of the appeal;

(3) The results of the appeal (*i.e.*, proper title, pay plan, series, and grade);

(4) The classification requested (*i.e.*, title, pay plan, series, and grade); and

(5) With the consent of the parties concerned, other reasonably identified information from the file.

(b) The Office will disclose to the parties concerned, the information contained in an appeal file in proceedings under this part, except when the disclosure would violate the proscription against the disclosure of medical information in § 297.205 of this chapter. For the purposes of this section, “the parties concerned” means the Government employee or former Government employee involved in the proceedings, his or her representative designated in writing, and the representative of the agency or the Office involved in the proceeding.

[50 FR 3313, Jan. 24, 1985, as amended at 54 FR 18879, May 3, 1989. Redesignated and amended at 70 FR 31310, May 31, 2005]

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PART 537—REPAYMENT OF STUDENT LOANS

Sec.

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537.110 Records and reports.

AUTHORITY: 5 U.S.C. 5379.

SOURCE: 66 FR 2791, Jan. 11, 2001, unless otherwise noted.

§ 537.101 Purpose.

This part provides regulations to implement 5 U.S.C. 5379, as amended, which authorizes agencies to establish a program under which they may agree to repay (by direct payment on behalf of the employee) all or part of any outstanding federally insured student loan or loans previously taken out by a candidate to whom an offer of employment has been made, or a current employee of the agency, in order to recruit or retain highly qualified personnel.

[66 FR 39406, July 31, 2001]

§ 537.102 Definitions.

In this part:

Agency has the same meaning as in 5 U.S.C. 4101(l) subparagraph (A), (B), (C), (D), or (E).

Employee has the meaning given that term in 5 U.S.C. 2105, except it does not include an employee occupying a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy advocating character (*i.e.*, employees serving under Schedule C appointments).

Head of agency means the head of an Executive agency or an official who has been delegated the authority to act for the head of the agency in the matter concerned.

Service agreement means a written agreement between an agency and an employee under which the employee